APPENDIX A.

Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

INTERSTATE MARINA DEVELOPMENT CO., Plaintiff-Appellant, v. THE STATE OF CALIFORNIA, et al., Defendants-Appellees. No. 81-5312.

Filed: August 23, 1982.

Appeal from the United States District Court for the Central District of California, Malcolm M. Lucas, District Judge, Presiding.

Argued and Submitted: June 10, 1982.

Before: CHAMBERS and GOODWIN, Circuit Judges, and SOLOMON,* Senior District Judge.

Interstate Marina Development Corporation (IMDC) appeals the order dismissing its action against the State of California, the California Coastal Commission (State Commission), and the Coastal Commissioners for damages for delay in obtaining a coastal development permit. IMDC also appeals from the order dismissing its pendent state claims.

IMDC is a limited partnership holdinng a 60-year lease on approximately four acres of county-owned land in Marina Del Rey, California. IMDC's lease required it to build restaurants, hotels, apartments, and other facilities on the land, and to obtain the necessary permits for that construction from the appropriate regulatory agencies.

IMDC applied for a coastal development permit under the California Coastal Zone Conservation Act of 1972. Marina Plaza, which shares a general partner with IMDC,

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*The Hon. Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

also applied for a permit for a project on other land in the area. In February, 1976, the South Coast Regional Commission (Regional Commission), a subdivision of the State Commission, denied IMDC's application. The State Commission refused to hear the appeal. IMDC brought actions in both state superior court and federal district court. The district court abstained until the California Court of Appeals upheld the State Commission's ruling in *Marina Plaza v. California Coastal Zone Conservation Commission*, 73 Cal. App. 3d 311, 140 Cal. Rptr. 725 (1977). The district court then reassumed jurisdiction.

In January, 1979, the Regional Commission agreed to a remand of IMDC's application under the Coastal Act of 1976, and granted an unconditional permit to build the hotel complex. On appeal to the State Commission, IMDC's and Marina Plaza's applications were consolidated. The State Commission granted the permits, but imposed restrictions on the size and design of the projects. IMDC contends that the restrictions made the project uneconomic and unfairly tied the IMDC project to the Marina Plaza project. IMDC sought a Writ of Mandamus to set aside these restrictions. The State court granted the Writ. The State Commission later issued an appropriate permit with fewer restrictions.

IMDC amended its complaint in federal district court. IMDC contended that (1) because of delay caused by litigation, the State has in effect taken part of IMDC's leasehold interest without compensation, in violation of the Fifth and Fourteenth Amendments; and (2) the State Commission has violated the Contracts Clause by impairing IMDC's lease with Los Angeles County. IMDC sought lost rent, increased costs, and other expenses as damages. IMDC also asserted pendent claims based on state law.

The district court dismissed the Fifth Amendment claim. IMDC appealed this dismissal before the district court de-

cided the Contracts Clause issue. The appeal was dismissed under Ninth Circuit Rule 19(b)[1] for failure to prosecute.

The district court granted summary judgment against IMDC on the Contracts Clause issue, and then dismissed IMDC's pendent state claims. IMDC appeals from all of the orders of the district court. We affirm.

I. RES JUDICATA EFFECT OF RULE 19(b) DISMISSAL

The defendants contend that the doctrine of Res Judicata bars IMDC from raising the Fifth Amendment claim in this appeal, because the first appeal was dismissed under Ninth Circuit Rule 19(b) for failure to prosecute. We disagree.

The order dismissing IMDC's Fifth and Fourteenth Amendment claims was an interlocutory order, not appealable without an express direction for the entry of judgment. Fed. R. Civ. P. 54(b). No such direction was made here. Therefore, the order which dismissed only some of the claims is not a final order appealable under 28 U.S.C. § 1291. *Fletcher* v. *Gagosian*, 604 F.2d 637, 638 (9th Cir. 1979); *Huckeby* v. *Frozen Food Express*, 555 F.2d 542, 546 (5th Cir. 1977).

IMDC's failure to prosecute the appeal of an unappealable order does not bar it from raising the same issue in this appeal from the final judgment.

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[1]Ninth Circuit Rule 19(b) provides:

Dismissal for Failure to Prosecute

When an appellant fails to timely file the record, pay the docket fee, file a brief or otherwise comply with rules requiring processing the appeal to hearing, the Clerk will enter an order dismissing the appeal. The Clerk will notify each appellant in writing of this provision of the rules.

II. INVERSE CONDEMNATION OF IMDC'S LEASEHOLD INTEREST.

IMDC contends that the regulatory activities of the State Commission constituted a taking without just compensation, in violation of the Fifth Amendment. IMDC joined as defendants, not only the State of California, but also the members of the Commission, acting in both their individual and official capacities.

The district court dismissed all of IMDC's claims against both the State and the Commission, on Eleventh Amendment immunity grounds. *Edelman v. Jordan*, 415 U.S. 651 (1974). The court then dismissed the inverse condemnation claims against the other defendants because there was no unconstitutional taking of property. The court relied on *Agins v. Tiburon*, 447 U.S. 255, 260-61 & n. 9 (1980), a case in which a zoning ordinance restricted the number of houses that the property owners could build on their land. The *Agins* Court held that the ordinance did not effect a taking because the owners did not show that the ordinance denied them all economic uses of their land. *Id.* at 260. On the property owner's contention that the city's precondemnation activities constituted a taking, the Court said:

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." [citations omitted]

Id. at 263, n. 9. Here, even assuming that IMDC adequately alleged that the State Commission's action deprived the lease of substantially all value, that deprivation was only temporary. When the restrictions were set aside, the property regained its value. IMDC does not assert that the delay

was extraordinary. The delay, therefore, did not constitute a 'taking' in the constitutional sense.

IMDC urges us to ignore the language in *Agins* and follow Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 658-59 (1981), which asserts that damages may be awarded for temporary takings. There may be circumstances in which a delay entitles a property owner to damages; but this is not one of them.

III. VIOLATION OF THE CONTRACTS CLAUSE.

IMDC asserts that under its lease with the County of Los Angeles, it was entitled to build a hotel complex, and that the restrictions on the project, before they were removed, temporarily defeated the intentions of the parties to the lease for the development of the property. IMDC therefore contends that the defendants violated Article I, Section 10 of the Constitution, which prohibits states from passing laws which impair the obligations of contracts. The district court granted the defendants' motion for summary judgment and held that there was no evidence that any of the defendants' actions impaired Plaintiff's contract obligations. We agree.

The lease signed by IMDC and the County of Los Angeles stipulated that IMDC must obtain appropriate permits before it develops the leased property. The lease does not guarantee IMDC the right to a permit, nor does it provide that the land shall be free of permit restrictions. The defendants' actions did not affect any of IMDC's rights or obligations under the lease. *See Northwestern National Life Insurance Co.* v. *Tahoe Regional Planning Agency*, 632 F. 2d 104, 106 (9th Cir. 1980). Even without the permit provision, the parties could not contract to restrict the State's ability to restrict development of coastal areas. *See Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908).

IV. OTHER ISSUES

IMDC contends that its action asserts a valid claim against the State under the Fifth and Fourteenth Amendments, *see Weiss* v. *Lehman*, 642 F. 2d 265 (9th Cir. 1981), and that Eleventh Amendment immunity does not bar a direct constitutional claim. IMDC also contends that California has waived its Eleventh Amendment immunity by statute. Because we hold that IMDC has no claim under either the Fifth Amendment or the Contracts Clause, we express no opinion on these other issues.

AFFIRMED.

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

INTERSTATE MARINA DEVELOPMENT COMPANY, Appellant v. THE STATE OF CALIFORNIA, et al., Appellees. No. 81-5312.

Filed: October 12, 1982.

Before: CHAMBERS and GOODWIN, Circuit Judge, and SOLOMON,* District Judge

Appellant's petition for rehearing is denied.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.